No. 83-78

In the Supreme Court of the United States

OCTOBER TERM, 1983

GEORGE M. VERRUSSIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a criminal defendant may appeal the district court's denial of his motion to dismiss an indictment that he claimed had been improperly reinstated following his breach of a plea bargain.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 1983. A petition for rehearing was denied on June 7, 1983. The petition for a writ of certiorari was filed on July 14, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On June 22, 1979, a grand jury in the United States District Court for the Southern District of Indiana indicted petitioner on eight counts of possessing controlled substances with intent to distribute, in violation of 21 U.S.C. 841(a)(1). During plea negotiations, the government

obtained information that petitioner was involved in a conspiracy to transport cocaine. Thereafter petitioner entered a plea bargain whereby he pled guilty to one of the possession counts and agreed to cooperate with the government and to testify truthfully before the grand jury. In exchange, the government dismissed all but the one possession count to which petitioner pled guilty and agreed not to charge petitioner with any additional offenses then known to the government, arising out of the alleged conspiracy (Pet. App. A7-A8). Petitioner was sentenced to serve 30 nights in the Monroe County, Indiana jail and was placed on probation for one year.

On January 8, 1980, petitioner testified before the grand jury. During the course of his testimony, he stated that he was merely a courier of cocaine between Fort Lauderdale and the Southern District of Indiana, that he was not an associate or client of the individuals for whom he was working, and that he was not himself a distributor of cocaine. Gov. Exh. 2; see Pet. App. A15. Thereafter, the government received information indicating that his testimony was perjured (Pet. App. A7). The government viewed petitioner's conduct as a breach of the plea agreement and therefore obtained a second indictment charging him with two counts of possessing a controlled substance with intent to distribute, in violation of 21 U.S.C. 841(a)(1) (Counts 2 and 3); one count of conspiring to commit that offense, in violation of 21 U.S.C. 846 (Count 1); and one count of testifying falsely before a grand jury, in violation of 18 U.S.C. 1623 (Count 4). Only the offense alleged in Count 3 had been charged in the initial indictment.

2. Petitioner moved to dismiss Counts 1, 2 and 3 of the second indictment on the ground that he had been put in former jeopardy on those counts as a result of the plea agreement. The district court conducted a hearing on the motion. The DEA agent in charge of the investigation

testified at the hearing to the existence of information in "direct contradiction" to petitioner's grand jury testimony (Tr. 17-18).[1] The agent described statements made to him and to the grand jury by the co-conspirators and other sources regarding petitioner's role in the conspiracy (Tr. 17-46).

The district court denied petitioner's motion to dismiss Counts 1 through 3 on the basis of "the evidence submitted at the [hearing]" (Pet. App. A17). Upon a subsequent motion by petitioner, the court dismissed the perjury count without prejudice on speedy trial grounds (*id.* at A19-A20).[2]

3. Petitioner sought interlocutory review of the district court's order denying his motion to dismiss Counts 1 through 3, invoking *Abney* v. *United States*, 431 U.S. 651 (1977). The court of appeals dismissed the appeal for lack of jurisdiction (Pet. App. A1-A2), holding that "this case does not fit within the *Abney* exception because jeopardy never attached with respect to the eight counts voluntarily dismissed by the government" (*id.* at A2). The court also stated that petitioner's "failure to testify truthfully before the grand jury rendered the [plea] agreement null and void" (*ibid.*).[3]

ARGUMENT

Petitioner contends that the court of appeals erred in dismissing his interlocutory appeal from the district court's

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[1]"Tr." refers to the transcript of the hearing dated November 19, 1982.

[2]The court attributed the 11-week delay in trial on the perjury charge to "confusion as to the effect of [petitioner's] interlocutory appeal of this Court's denial of his prior motion to dismiss Counts I through III" and the failure of court personnel to note that the perjury charge was severed and not included in the appeal (Pet. App. A21).

[3]In a matter unrelated to this petition, the government has appealed an order suppressing certain evidence arising out of petitioner's arrest.

order denying his motion to dismiss Counts 1 through 3 of the indictment. He argues that the government cannot prosecute him on those counts because he was in former jeopardy with respect to them as a result of the plea agreement. The court of appeals correctly held that jeopardy had not attached as a result of the pretrial dismissal of the original charges against petitioner, and thus that it had no jurisdiction to review the district court's order denying petitioner's motion to dismiss the indictment. Petitioner's claim of a violation of the Double Jeopardy Clause is frivolous, and further review by this Court is unwarranted.

1. The mere invocation of the Double Jeopardy Clause does not entitle a criminal defendant to appeal the denial of a motion to dismiss. *United States* v. *Ritter*, 587 F.2d 41, 43 (10th Cir. 1978); see *United States* v. *Becton*, 632 F.2d 1294, 1296 (5th Cir. 1980), cert. denied, 454 U.S. 837 (1981). The claim of former jeopardy "requires at least a colorable showing that the defendant once before has been in jeopardy of federal conviction on the same or a related offense." *United States* v. *MacDonald*, 435 U.S. 850, 862 (1978).

Here, petitioner has failed to make even a colorable showing for, as the court of appeals held, jeopardy had "never attached with respect to the eight counts voluntarily dismissed by the government" pursuant to the plea agreement (Pet. App. A2).[4] This Court has held that jeopardy does not attach until the accused is "put to trial before the trier of the facts, whether the trier be a jury or a judge."

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[4]Even if petitioner's legal analysis were correct, the government would be barred from prosecuting petitioner *on double jeopardy grounds* only for Count 3, since he was not charged in the original indictment with the offenses alleged in Counts 1 and 2. However, the terms of the plea agreement — if the government remains bound by it — would presumably preclude prosecution on Counts 1 and 2 as well.

United States v. *Jorn*, 400 U.S. 470, 479 (1971) (plurality opinion). When charges are dismissed prior to trial, as in this case, jeopardy has not attached. *Serfass* v. *United States*, 420 U.S. 377, 389 (1975).

Petitioner urges this Court to adopt the position that jeopardy attaches to charges dismissed or not filed pursuant to a plea bargain on other charges (Pet. 5), apparently on the reasoning that "the same interests obtain in this context as exist in the traditional double jeopardy context" (*ibid.*). However, this Court has rejected the notion that the concept of former jeopardy should be extended to stages of the criminal justice process that, although not resulting in jeopardy in a "formal or technical" sense, present the "functional equivalent" of it. *Serfass*, 420 U.S. at 389-390. As the Court observed, the constitutional policies underpinning the Double Jeopardy Clause simply are not implicated before that point in the proceedings when the defendant is put to trial before the trier of facts. 420 U.S. at 390-391; see *Crist* v. *Bretz*, 437 U.S. 28, 32-33 (1978).[5] The proceedings concerning petitioner's initial indictment on the dismissed charges did not reach that point.

That the dismissal in this case occurred as part of a plea agreement is beside the point. The government's breach of a plea agreement can be a violation of due process (*Santobello* v. *New York*, 404 U.S. 257 (1971)), but the right of interlocutory appeal under *Abney* applies only to double jeopardy claims.[6] As we have shown, petitioner's reindictment could not constitute double jeopardy because

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[5]As the Court pointed out, when charges are dismissed prior to trial, as they were in this case, the defendant "is often spared much of the expense, delay, strain, and embarrassment which attend a trial." *Serfass*, 420 U.S. at 391.

[6]Significantly, *Santobello* does not so much as refer to the Double Jeopardy Clause, and the lower courts have generally held that breach of a plea bargain by the government is a due process, rather than a

jeopardy had never attached with respect to the dismissed charges in the original indictment. Petitioner's remedy for the alleged breach of the plea agreement, if relief is denied by the district court, is the same as that for any other violation of due process: appeal from final judgment. See *United States* v. *Hollywood Motor Car Co.*, No. 81-1144 (June 28, 1982). The courts of appeals that have considered the issue have therefore rejected appeals from orders denying motions for dismissal of indictments based on assertions of former jeopardy arising from prior plea agreements. *United States* v. *Rosario*, 677 F.2d 614, 615 n.4 (7th Cir.), cert. denied, No. 82-5025 (Oct. 4, 1982); *United States* v. *Eggert*, 624 F.2d 973 (10th Cir. 1980); *United States* v. *Solano*, 605 F.2d 1141, 1142-1143 (9th Cir. 1979), cert. denied, 444 U.S. 1020 (1980); see also *United States* v. *Brizendine*, 659 F.2d 215 (D.C. Cir. 1981); *United States* v. *Cavin*, 553 F.2d 871 (4th Cir. 1977); but see *United States* v. *Alessi*, 536 F.2d 978 (2d Cir. 1976).[7]

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double jeopardy violation. See *United States* v. *Quigley*, 631 F.2d 415, 416 (5th Cir. 1980); *United States* v. *Solano*, 605 F.2d 1141, 1142-1143 (9th Cir. 1979), cert. denied, 444 U.S. 1020 (1980); but see *United States* v. *Stricklin*, 591 F.2d 1112, 1123 n.3 (5th Cir.), cert. denied, 444 U.S. 963 (1979) (dictum).

[7]Petitioner relies heavily on *Alessi* (Pet. 4-5, 6-7), but the reasoning in *Alessi* has been rejected in subsequent decisions of this Court. In *Alessi*, which was decided before *Abney*, *MacDonald*, or *Hollywood Motor Car Co.*, the court permitted an appeal from an order denying the defendant's motion to dismiss an indictment for alleged inconsistency with a prior plea bargain. The court acknowledged that the basis for the claim was due process (536 F.2d at 980), but held that such order is appealable because "similar interests are at stake" to those in double jeopardy appeals. *Ibid.* Another panel of the same court in a related case, in an opinion by Judge Friendly, disagreed with this holding but did not urge en banc consideration of the issue because of an expectation that this Court would soon resolve it. *United States* v. *Alessi*, 544 F.2d 1139 (2d Cir.), cert. denied, 429 U.S. 960 (1976). Since *Alessi* was decided, this Court has made clear that the collateral order exception to the final judgment rule does not generally apply to due process claims

Upon determining that there was no substance to petitioner's double jeopardy claim, the court of appeals properly dismissed the appeal. The court's relatively expeditious treatment of the appeal is an example of the "summary procedures * * * to weed out frivolous claims of former jeopardy" endorsed by this Court in *Abney*, 431 U.S. at 662 n.8. See *United States* v. *Head*, 697 F.2d 1200, 1204-1205 (4th Cir. 1982), cert denied, No. 82-1655 (June 20, 1983); *United States* v. *Brizendine*, 659 F.2d at 224-226; *United States* v. *Leppo*, 634 F.2d 101, 105 (3d Cir. 1980); *United States* v. *Dunbar*, 611 F.2d 985, 989 (5th Cir.) (en banc), cert. denied, 447 U.S. 926 (1980).

2. Even assuming arguendo that under some circumstances a criminal defendant has the right to interlocutory appeal concerning alleged violations of a plea agreement by the government, the court of appeals correctly dismissed the appeal in this case. Petitioner cannot challenge the government's fidelity to the plea agreement when he has breached his part of the agreement — "to testify truthfully before the grand jury" (Pet. App. A2). "One who fails to carry out his part of the bargain cannot invoke the agreement against the government." *United States* v. *Gogarty*, 533 F.2d 93, 95 (2d Cir. 1976); see also *United States* v. *Mooney*, 654 F.2d 482, 486 (7th Cir. 1981).

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even when their ultimate vindication on appeal would necessitate a new trial. *Hollywood Motor Car Co., supra;* see also *MacDonald, supra.* "[R]eversal of the conviction and, *where the Double Jeopardy Clause does not dictate otherwise*, the provision of a new trial free of prejudicial error normally are adequate means of vindicating the constitutional rights of the accused." *Hollywood Motor Car Co.*, slip op. at 5 (emphasis added); see also *Abney*, 431 U.S. at 663. Thus the courts of appeals since *Alessi* have unanimously recognized that the defendant's right of appeal in double jeopardy cases does not extend to cases where previous charges were dismissed before trial, pursuant to a plea bargain. Although a conflict technically exists between the Second Circuit, which decided *Alessi*, and the other circuits, the conflict has effectively already been resolved by this Court and does not require further attention.

Here, the government presented evidence at the hearing on petitioner's motion to dismiss showing that three of petitioner's co-conspirators had contradicted his grand jury testimony that he was merely a courier of drugs and not a distributor. In its order denying petitioner's motion the district court took express note of "the evidence submitted at the oral argument" (Pet. App. A17), and its decision constituted an implicit finding that petitioner had not complied with the plea agreement. In dismissing petitioner's interlocutory appeal, the court stated explicitly that petitioner had "fail[ed] to testify truthfully before the grand jury * * *" (*id.* at A2).[8] Since there was no conceivable basis for petitioner's claim of a double jeopardy violation under these circumstances, the court properly dismissed the appeal. See *Abney*, 431 U.S. at 662 n.8.[9]

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[8]Thus, petitioner's claim that no court has "approved" the government's decision to treat the violated plea agreement as void (Pet. 8-11) is belied by the results of the proceedings below. Both the district court and the court of appeals have concluded that petitioner breached the agreement.

[9]Petitioner further argues (Pet. 11-13) that the government could not treat the plea agreement as void without first trying and convicting him for perjury. However, nothing in the plea agreement itself required the government to obtain petitioner's conviction for perjury before cancelling the agreement if petitioner testified falsely, and we are aware of no authority for the proposition that such a requirement may be implied. There is no reason why the giving of false testimony should be treated differently from other violations of plea agreement terms — such as refusing to cooperate with the government — which are not themselves crimes and therefore cannot be established by an independent criminal prosecution.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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